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No. 90-904

in the Supreme Court of the United States

October Term, 1990

The Miami Herald Publishing Company, et al.,

Petitioners,

vs.

Department of Revenue, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Reply To Brief In Opposition To The Petition For Writ Of Certiorari

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QUESTIONS PRESENTED

I. Does Florida's application of its sales and use tax to magazines but not to newspapers violate the First Amendment?

II. Assuming *arguendo* that Florida's application of its sales and use tax to magazines but not to newspapers violates the First Amendment, does the First Amendment require that the Florida sales and use tax as applied to magazines be invalidated?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Reasons for Granting the Writ	1
Conclusion	5

TABLE OF AUTHORITIES

Cases	Page
Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722 (1987)	2
Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (Fla. 1990)	3
Hearst Corp. v. Iowa Dep't of Revenue and Finance, 461 N.W.2d 295 (Iowa 1990), *petition for cert. filed*, 59 U.S.L.W. 3519 (U.S. Jan. 29, 1991)	2
Newsweek, Inc. v. Celauro, 789 S.W.2d 247 (Tenn. 1990), *petition for cert. filed*, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990)	2
Southern Living, Inc. v. Celauro, 789 S.W. 2d 251 (Tenn. 1990), *petition for cert. filed*, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990)	2
Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984)	4
Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 109 S.Ct. 1248 (1989)	4
Other Authorities	
28 U.S.C. §1257(a)	3
Section 212.21, Florida Statutes	3

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REASONS FOR GRANTING THE WRIT

In its Brief in Opposition to the Petition for Writ of Certiorari, the Florida Department of Revenue (the "Department") offers three reasons why the Newspapers'* petition should be denied. As explained below, none of these reasons is meritorious.

*Petitioners The Miami Herald Publishing Company, The Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company and Citrus Publishing Company, Inc. are referred to collectively herein as the "Newspapers."

First, the Department contends that the decision of the Supreme Court of Florida is not in conflict with the decision of another state court of last resort. Brief in Opposition at 6–7. This contention is palpably false. As the Department itself concedes, the Florida court's determination that the First Amendment proscribes the differential taxation of magazines and newspapers is in clear and direct conflict with Iowa's conclusion that such a taxation scheme is constitutionally permissible. *See Hearst Corp. v. Iowa Department of Revenue and Finance*, 461 N.W.2d 295 (Iowa 1990), *petition for cert. filed*, 59 U.S.L.W. 3519 (U.S. Jan. 29, 1991) (No. 90–1118); Brief in Opposition at 7, n.4. Likewise, Florida's decision that the correct remedy for differential taxation is the taxation of both magazines and newspapers is in clear and direct conflict with the Tennessee court's judgment that all such publications should be tax exempt. *See Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990), *petition for cert. filed*, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90–273); *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tenn. 1990), *petition for cert. filed*, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90–273).

Second, the Department argues that the Newspapers lack standing to contest the decision of the Supreme Court of Florida. Brief in Opposition at 11–13, 15–16. This argument, too, is frivolous. As this Court made clear in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987), a differential tax is the proper subject of a constitutional challenge. 107 S.Ct. at 1726. The fact that the press as a whole does not have an absolute right to be free from tax does not immunize a differential tax from constitutional scrutiny. *Id.* Moreover, the Newspapers' interest in seeking review of the decision of the Florida Supreme Court far exceeds the academic interest in "precedential value" urged by the Department. By its terms, the decision strikes the newspaper exemption from the Florida sales and use tax thereby subjecting newspapers to

the tax. The decision's adverse effect on the Newspapers is thus undeniable.

Finally, the Department contends that the decision below is not reviewable in this Court because it does not raise a substantial federal question. Brief in Opposition at 13–19. This contention must also be rejected. The petition pending before this Court presents two questions; both were decided adversely to the Newspapers by the Florida Supreme Court and both raise important federal constitutional issues. The first question concerns the propriety of a state sales tax which is differentially imposed on magazines and newspapers. The Florida Supreme Court clearly and expressly decided this question on First Amendment grounds. *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304, 1309 (Fla. 1990); App. A–10. Accordingly, this aspect of the decision below is clearly reviewable by this Court. *See* 28 U.S.C. §1257(a).

The second question presented by the Newspapers is whether the remedy for differential taxation of the press is constitutionally mandated by the First Amendment. In this regard, the Florida Supreme Court held that the remedy was a question of state law and invalidated the newspaper exemption pursuant to section 212.21, Florida Statutes. 565 So.2d at 1309–11; App. A–10–14. Because the court chose to rely on Florida law, the Department now argues that this aspect of the Florida court's decision rests on an independent and adequate state-law ground and is therefore unreviewable. This argument is mistaken. The question whether the choice of remedy is a matter of federal constitutional law or of state law is, in the first instance, a federal question. The fact that the Florida Supreme Court decided the issue as a matter of Florida law reveals that the court decided the federal constitutional question (of the applicability of the First Amendment) adversely to the Newspapers. Accordingly, this question is also properly

before this Court for review. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 109 S.Ct. 1248, 1252–53, n.4 (1989) (citing cases); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984).

CONCLUSION

For the reasons set forth in the Newspapers' petition for writ of certiorari and herein, the Newspapers respectfully request that the petition be granted or, in the alternative, that consideration of this case be stayed pending the Court's disposition of *Pledger v. Medlock*.

Respectfully submitted,

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